LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-495

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), *et al.*,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

JOHN D. FASSETT,
Box 1832,
New Haven, Conn. 06508,
Counsel for Respondent.

S. ROBERT JELLEY,
Box 1832,
New Haven, Conn. 06508,
Of Counsel.

TABLE OF CONTENTS

Opinions Below .....

Jurisdiction .....

Question Presented .....

Counterstatement of Case .....

Reasons for Denying the Petition .....

A. The Decision Below Is Not Final .....

B. Some of the Claimed Federal Questions Were Not Raised Below .....

C. The Claimed Questions Are Not Presented .....

1. The claim re motivation for the suits was expressly rejected by the courts below .....

2. The Petition incorrectly represents the status of the record re compensatory damages .....

D. No Federal Question Of Substance Is Presented

1. Awards of exemplary damages have been upheld in other tort cases arising out of strikes .....

2. The Connecticut rule re exemplary damages is not unreasonable .....

3. The Connecticut law was correctly applied .....

4. There is no conflict among courts on the issue .....

Conclusion .....

Appendix (Defendants' Motion For Reargument) .....

AUTHORITIES CITED

Cases:

	PAGE
Chykirda v. *Yanush*, 131 Conn. 565 (1945)	13
Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 377 U. S. 386 (1964)	6
International Assn. of Machinists v. *United Aircraft Corp.*, 56 L.R.R.M. 2389 (D. Conn. 1964), *aff'd* 333 F.2d 367 (2d Cir. 1964), *cert. den.* 379 U. S. 946 (1964)	15
Linn v. *Plant Guard Workers*, 383 U. S. 53 (1966)	7, 12
Local No. 438 v. *Curry*, 371 U. S. 542 (1963)	6
Maisenbacker v. *Society Concordia*, 71 Conn. 369 (1899)	13
Mills v. *Alabama*, 384 U. S. 214 (1966)	6
Munson v. *Atwood*, 108 Conn. 285 (1928)	2
Organization for a Better Austin v. *Keefe*, 402 U. S. 415 (1971)	6
Parker v. *Illinois*, 333 U. S. 571 (1948)	6
Radio Station WOW, Inc. v. *Johnson*, 326 U. S. 120 (1945)	7
Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62 (1948)	5
Saraceno v. *Capitol Theatre Realty Corp.*, 154 Conn. 669 (1967)	2
Triangle Sheet Metal Works, Inc. v. *Silver*, 154 Conn. 116 (1966)	12
United Auto Workers v. *Russell*, 356 U. S. 634 (1958)	11
United Construction Workers v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954)	11
United Mine Workers v. *Gibbs*, 383 U. S. 715 (1966)	11
Vogel v. *Sylvester*, 148 Conn. 666 (1961)	13

Statutes:

	PAGE
28 U.S.C. §1257	2, 5, 7
Connecticut Constitution, Art. I, Sec. 8	7

Other:

Annot., 30 A.L.R.3d 1443 (1970)	13
Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517 (1957)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-495

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), *et al.*,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Opinions Below

The memorandum of decision of the Superior Court on liability is reported unofficially at 68 L.R.R.M. 2488, 58 CCH Lab. Cas. ¶51,930, and its memorandum of decision on damages is reported unofficially at 70 L.R.R.M. 2577, 59 CCH Lab. Cas. ¶52,043. The opinion of the Supreme Court of Connecticut is reported unofficially at 77 L.R.R.M. 2436, 66 CCH Lab. Cas. ¶52,602, but without the Supreme Court's amendment which appears on page 91a of Petitioners' Appendix.

Jurisdiction

The judgment below is not "final" within the meaning of 28 U.S.C. §1257, as is obvious not only from the discussion at pages 9-13 of the petition but also from the discussion herein at pages 5-7. Parts (b) and (c) of the claimed federal question set out on page 2 of the petition were never raised as federal questions in the court below, as is apparent from Defendants' Motion for Reargument (pp. 16-21 *infra*) and the discussion at page 7 herein.

Question Presented

Parts (a) and (b) of petitioners' asserted "Question Presented" are not presented by the facts of the case, as discussed at pages 8-10 herein.

Counterstatement of Case

This is a frivolous petition! Wholly apart from the obvious absence of finality to the judgment below and petitioners' failure to raise below as federal questions parts of the question sought to be raised here, the petition seeks to obtain review of such judgment by this Court on the basis of issues which clearly are not presented by the case.

The two actions consolidated in the Connecticut courts are strictly common law actions claiming damages resulting from intentional torts. The judgments below were bottomed squarely on findings[1] that such causes of action had been overwhelmingly proved. Petitioners have failed

[1] The findings and not the memorandum of decision are the basis for appellate review under Connecticut law: "The only available source of facts on any appeal is the finding as provided for by statute." *Munson v. Atwood*, 108 Conn. 285, 290 (1928); "The memorandum of decision establishes no facts and cannot take the place of the finding, which is essential to test rulings on evidence and conclusions of law or fact drawn by the trier. . . ." *Saraceno* v. *Capitol Theatre Realty Corp.*, 154 Conn. 669, 672 (1967).

to print in their appendix these findings of the trial court; they chose not even to print the finding which squarely found their primary claim here to be without basis in fact.[2] They also failed to file the printed record which contains the trial court's findings (Record, pp. 183-313); respondent has subsequently caused the record to be filed. Even the most cursory examination of the detailed and careful findings of the trial court (Record, pp. 183-244) clearly establishes that the conclusion that petitioners intentionally engaged in the illegal activities for which they were held responsible was the only possible conclusion that could have been reached by any court. The Connecticut Supreme Court, after concluding that the findings pertinent to petitioners' jurisdictional claims were fully supported, held:

> "Based on the doctrine of federal preemption, the defendants assign error in the court's refusal to dismiss both actions on jurisdictional grounds. There is no denying the fact that the jurisdiction of the state courts over labor disputes has been greatly restricted by the passage of the Labor Management Relations Act, 1947, and the establishment of the Labor Management Relations Board. The complaints in these actions alleged in substance, however, that, while the plaintiff was negotiating collective bargaining agreements with Lodge 1746 and Lodge 743, all of the defendants joined in concerted and unlawful mass picketing, personal violence, invective and intimidation with the wilful and malicious purpose of coercing and preventing persons from entering the plaintiff's premises as a result of which the

[2] Finding 778 (Record, p. 312) reads: "At no time from the period of the strike to the institution of these actions or thereafter did plaintiff waive its claim for damages, nor condone the unlawful acts of the defendants, *nor use these cases or the threat thereof to induce the defendants to withdraw their claims in pending litigation,* and plaintiff is not estopped to assert the claims made in these cases." (emphasis added)

plaintiff suffered severe financial damage. It is well established that state courts have jurisdiction over such tort actions." (Appendix, pp. 67a-68a).

• • • • •

"Each of the actions at issue here sought damages caused by the defendants' 'wilful and malicious' tortious conduct. Clearly enough the defendants had the full right to stage a strike but they had no right to participate, as the evidence established that they did, in violent and unlawful acts at the gates of and on the premises of the plaintiff's several plants. Those acts occurred from June 8 to August 8 and 9, 1960. Their effect was to reduce the number of employees who would normally have been expected to report for work and this caused substantial loss to the plaintiff. For the damage proved to have been caused to the plaintiff by those acts, the defendants should be held liable under the established rules of tort liability." (Appendix, p. 86a).

During the damage trial respondent proved substantial damages resulting from involuntary absences of employees commencing from the first day of the strike. Once again, the trial judge made extensive findings with respect to the facts in issue (Record, pp. 248-308). However, the trial judge, based on an erroneous conception of how damages should be computed under Connecticut law, disallowed all damages resulting from absences during the period a nonviolent strike would have lasted. Because such misconception denied respondent recovery for substantial damages which clearly had been proved, respondent requested review of the amounts of the judgments awarded by the trial court. Upon review, the Connecticut Supreme Court ordered a new trial as to the damage awards, specifically instructing the trial court to determine the amount of involuntary absences and resulting damages for the entire

period of the strike. Petitioners also appealed. The Connecticut Supreme Court rejected most of their numerous claims of error, but it did direct that in recomputing damages the trial court should exclude damages resulting from acts away from plaintiff's premises and should give credit for overtime worked during the strike. Contrary to petitioners' implication, it is clear that the intent and result of the Supreme Court decision will be to increase the amounts of the judgments. The exemplary damages awarded having been computed in accordance with the Connecticut rule, that aspect of the judgments of the trial court was affirmed in the following language:

> "The plaintiff alleged, and the court found, that tortious illegal acts which occurred during the strike were wilful and malicious. Under these circumstances, the plaintiff was entitled to recover punitive or exemplary damages in an amount which would serve to compensate the plaintiff to the extent of its expenses of litigation less taxable costs." (Appendix, pp. 87a-88a).

A further trial on the limited issues with respect to damages as specified by the Connecticut Supreme Court awaits disposition of this petition.

Reasons for Denying the Petition

A. The Decision Below Is Not Final.

Under *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), it is clear that the judgment below is not final within the meaning of 28 U.S.C. § 1257. Petitioners' discussion of the finality question (Petition, pp. 9-13) recognizes this and practically invites this Court to deny the petition on that ground.[3]

[3] See also the discussion in their Motion for Reargument (pp. 19-20 *infra*).

Petitioners justify their petition by the statement that "this Court's decisions appear to place upon a party seeking review of a state court judgment the duty to do so *at the right time*" (Petition, p. 9), and go on to cite *Parker* v. *Illinois*, 333 U.S. 571 (1948), and to discuss *Local No. 438* v. *Curry*, 371 U.S. 542 (1963), and later cases. But neither *Curry* nor what they refer to as the *"Curry* line" suggests that later review of those decisions would have been untimely. In *Curry* this Court held a determination of jurisdiction by the Georgia Supreme Court to be final for purposes of review, even though the case was remanded for issuance of a temporary injunction and further proceedings in connection with a permanent injunction. However, this Court went on to say, "If the permanent injunction issues, petitioner could then come here seeking the doubtful privilege of relitigating the entire matter before the National Labor Relations Board", 371 U.S. at 550, thereby indicating that the same question would have been reviewable upon determination of the entire case below. Similarly, in *Mills* v. *Alabama*, 384 U.S. 214, 217 (1966), this Court said:

> "Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable."

In neither *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), nor *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964), is there any indication that review could not have been had later.

This Court's statement in *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 127 (1945), that "where the remaining litigation may raise other federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews", has application here. The trial court's finding lists the numerous claims of law made by the petitioners during the trial (Record, pp. 420-431), many of which they pursued on appeal in the court below. Many of such claims purport to raise federal questions, and will undoubtedly be the subject of a further petition for certiorari after final adjudication of the matter below.

Since the decision below is clearly not final, the petition should be denied.

B. Some Of The Claimed Federal Questions Were Not Raised Below.

Parts (b) and (c) of defendants' claimed federal question (Petition, p. 2) deal with the relationship of exemplary damages to compensatory damages and with the amount of exemplary damages. As petitioners' Motion for Reargument in the court below indicates, (pp. 16-21 *infra*), these issues were never raised prior to the Motion for Reargument. Moreover in that motion they were discussed exclusively in terms of state law, although there was a passing reference to "federal law" and *"Linn* v. *Plant Guards,* 383 U.S. 53, 64" (p. 18 *infra*) and to "due process of law"[4] (p. 19 *infra*). Such references were insufficient to meet the requirement of 28 U.S.C. § 1257(3) that federal questions be "specifically set up or claimed."

[4] Connecticut's Constitution also contains a "due process" clause. Conn. Const., Art. I, Sec. 8.

C. The Claimed Questions Are Not Presented.

1. The claim re motivation for the suits was expressly rejected by the courts below.

The Superior Court expressly found in its Finding 778:

> "At no time from the period of the strike to the institution of these actions or thereafter did plaintiff waive its claim for damages, nor condone the unlawful acts of the defendants, nor use these cases or the threat thereof to induce the defendants to withdraw their claims in pending litigation, and plaintiff is not estopped to assert the claims made in these cases." (Record, p. 312)

Defendants assigned the making of Finding 778 as error (Record, p. 432). The Connecticut Supreme Court said:

> "The Court's finding, embraced in 866 numbered paragraphs covering 247 printed pages of the record is the subject of a massive attack by the defendants. It would prolong this opinion beyond all reason to discuss the errors assigned in the finding. Suffice it to say that they have been carefully examined and that no correction which would have a material bearing on the decisive issues is required." (Appendix, p. 67a)

In view of this finding, the question attempted to be presented by petitioners is not present in this case.

2. The Petition incorrectly represents the status of the record re compensatory damages.

Defendants' assertion that plaintiff "has obtained an award of about $300,000 of punitive damages without establishing a penny of actual damages" (Petition, p. 16) is a blatant misrepresentation. The court below said:

> "Each of the actions at issue here sought damages caused by the defendants' 'wilful and malicious' tor-

tious conduct. Clearly enough the defendants had the full right to stage a strike but they had no right to participate, as the evidence established that they did, in violent and unlawful acts at the gates of and on the premises of the plaintiff's several plants. Those acts occurred from June 8 to August 8 and 9, 1960. Their effect was to reduce the number of employees who would normally have been expected to report for work and this caused substantial loss to the plaintiff." (Appendix, p. 86a)

• • •

"The court found that the plaintiff had sustained substantial damage, but, as we have stated, the amount thereof must be recomputed. . . ." (Appendix, p. 91a)

As the court below explained:

"The trial court first computed the monetary value of the total damages sustained by the plaintiff because of its being deprived of a portion of its productive labor force at the Pratt & Whitney Division plants and at the Hamilton Standard Division plants. The figures arrived at were based primarily on two elements: (1) excessive manufacturing costs due to the diminution of the labor force, and (2) unabsorbed fixed overhead expenses, referred to as 'wasted overhead', due to diminution of the labor force." (Appendix, pp. 82a-83a)

• • •

"Having arrived at a figure representing the value of the total strike damage sustained by the plaintiff due to deprivation of a portion of its productive labor force, the court next proceeded to determine the portion of this figure which represented the loss directly due to the involuntary absence of employees because of fear and coercion as a result of the illegal tortious activities which had occurred." (Appendix, p. 84a)

The trial court found that the excessive manufacturing costs at the Pratt & Whitney Division were $1,208,352 and at the Hamilton Standard Division were $205,017 (Findings 713, 729, Record, pp. 302, 304) and those Findings were approved (Appendix, pp. 67a, 83a). It also found that the "wasted overhead" at the Pratt & Whitney Division was $7,171,632 and at the Hamilton Standard Division was $3,308,499 (Findings 719, 731, Record pp. 302-304), and those Findings were also approved, except that the Connecticut Supreme Court held that upon retrial credit must be given for overtime hours worked during the strike (Appendix, pp. 67a, 83a).

The trial court also found the percentages of absent bargaining unit employees who were absent because of defendants' tortious activities (Findings 653-656, 658-659, Record, pp. 293-294). A result of the Connecticut Supreme Court's decision is that those percentages must be redetermined upon retrial so as to exclude absences because of tortious activities away from the plant (Appendix, p. 87a). The remand by the Connecticut Supreme Court also was based on the fact that the trial court, in its computation of damages, awarded no damages for the first three weeks of the strike at the Pratt & Whitney Division and the first six weeks at the Hamilton Standard Division (Findings 742, 743, Record, pp. 307-308; see also Appendix, p. 64a). Accordingly, the Connecticut Supreme Court directed that on remand plaintiff is to be awarded damages for those periods (Appendix, p. 91a).

It is obvious from the above discussion that plaintiff has already established that it suffered substantial damages by reason of defendants' tortious conduct during the strike, and that all that remains to be done upon remand is to make the corrections directed by the Connecticut Supreme Court.

D. No Federal Question Of Substance Is Presented.

1. Awards of exemplary damages have been upheld in other court cases arising out of strikes.

To the extent that there exists any federal question with respect to the award of exemplary damages, it has already been decided by this Court.

In *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954), this Court affirmed a judgment by a Virginia court in a comparable tort action against a union including an award of $100,000 for punitive damages, relying on a detailed analysis of the legislative history of the Labor Management Relations Act as displaying an absence of intent by Congress to preclude such power to the States. Subsequently, in *United Auto Workers* v. *Russell*, 356 U.S. 634 (1958), this Court had before it an award of $10,000 including punitive damages by an Alabama jury to an employee prevented by tortious acts of a union from getting to his employment for a period of about five weeks. Citing its decision in *Laburnum* this Court affirmed the judgment with the following comments (356 U.S. at 646):

> "Punitive damages constitute a well-settled form of relief under the law of Alabama, when there is a willful and malicious wrong. . . . To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. . . . The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. . . ."

While the jury award including $100,000 of punitive damages involved in *United Mine Workers* v. *Gibbs*, 383 U.S.

715, 720 (1966), was reversed, there is no indication in such opinion that had liability been properly established an award of punitive damages as permitted by Tennessee law would have been disturbed. To the contrary, it appears that the petitioning union did not even challenge the propriety of some punitive damages under such circumstances but only challenged the amount thereof (Id. at 721, footnote 6).

Linn v. *Plant Guard Workers,* 383 U.S. 53 (1966), upon which petitioners rely (Petition, pp. 16, 17), in no way changes the rule or raises any question here. It is clear that this Court's holding that "the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages" (383 U.S. at 66), is only a necessary extension of the holding that a defamed plaintiff must prove actual harm in order to recover compensatory damages (383 U.S. at 65), and that both holdings are a result of the "*per se*" rule, peculiar to defamation actions, that permits recovery without proof of actual harm. (383 U.S. at 58, 64). Not only does the *Linn* holding have no bearing on the award of exemplary damages in a suit for strike violence, but even if it did, plaintiff has already shown that it suffered "compensable harm."

2. The Connecticut rule re exemplary damages is not unreasonable.

In *Triangle Sheet Metal Works, Inc.* v. *Silver,* 154 Conn. 116 (1966), the basis for an award of exemplary damages under Connecticut law was recently described by the Connecticut Supreme Court as follows:

> "The flavor of the basic requirement to justify an award of punitive or exemplary damages has been repeatedly described in terms of wanton and mali-

> cious injury, evil nature and violence. . . . The Restatement declares that punitive damages may be awarded only for 'outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others.' Restatement, 4 Torts §908, comment (b)."

For many years the Connecticut rule with respect to the computation of punitive damages, as summarized in *Maisenbacker* v. *Society Concordia,* 71 Conn. 369, 378 (1899), has been as follows:

> "The expenses of litigation are not an element of the damages termed in law actual or compensatory damages, 'they are not the natural and proximate consequence of the wrongful act,' and they can only be considered by the jury in those cases in which exemplary damages may be awarded. . . . Such expenses in excess of taxable costs, in cases in which they may be considered, limit the amount of punitive damages which can be awarded. . . ."

In *Chykirda* v. *Yanush,* 131 Conn. 565, 567 (1945), the Connecticut Supreme Court held:

> "The trial court gave the jury the correct rule: punitive damages consist of the expenses of the action that the plaintiff must meet, including the attorney's fee, from which 'would be deducted what are known as taxable costs.'"

Apparently Connecticut is the only state which limits exemplary damages to the expenses of litigation less taxable costs. *Note, Exemplary Damages in the Law of Torts,* 70 Harv. L. Rev. 517, 520 (1957); Annot., 30 A.L.R.3d 1443, 1453 (1970). In addition, the Connecticut rule requires proof of such expenses. *Vogel* v. *Sylvester,* 148 Conn. 666, 673 (1961). It is submitted that the Connecticut rule with

respect to exemplary damages is more favorable to defendants than the rules in other states, and that it raises no substantial federal question.

3. The Connecticut law was correctly applied.

The trial court specifically found that "the conduct of each of the defendants on the basis of which liability has been found to exist was comprised of wanton, malicious, violent and intentional acts, thereby justifying an award of exemplary or punitive damages." (Finding 744, Record, p. 308). In accordance with Connecticut law, the plaintiff presented evidence on its expenses of litigation.[5] The trial court made detailed findings as to such expenses (Findings 745-759, Record, pp. 308-310). The court below held that the findings were correct (Appendix, p. 67a) and that the award was proper (Appendix, p. 88a).

The award of exemplary damages covers only plaintiff's expenses through the end of the damages trial in the trial court (Findings 746-748, Record, p. 308), and does not cover the expenses of the appeal to the Connecticut Supreme Court, the proceedings in this Court, or the retrial below.

4. There is no conflict among courts on the issue.

Plaintiff knows of no conflict among counts concerning the award of exemplary damages in actions for violence during strikes, and defendants have referred to none in their petition. Moreover, the Connecticut rule limiting exemplary damages to the expenses of litigation less taxable costs is apparently unique; any ruling by this Court concerning exemplary damages in Connecticut would have little or no value as precedent elsewhere.

---

[5] Some of such evidence is summarized in the Record at pages 402-407.

Conclusion

While petitioners justify the filing of their petition as an abundance of caution to avoid being charged with having waived their rights, a quick perusal of the record will demonstrate that this is but one example of the multitude of procedural devices they have employed to attempt to prevent this litigation from being brought to a conclusion. The Record shows some of their maneuvers in the trial court (Record, pp. 11, 24, 49, 91, 92). In addition, they brought an action seeking to enjoin the state court suits which was carried to this Court. *International Assn. of Machinists* v. *United Aircraft Corp.*, 56 L.R.R.M. 2389 (D.Conn. 1964), *aff'd* 333 F.2d 367 (2d Cir. 1964), *cert. den.* 379 U.S. 946 (1964). Obviously, many more maneuvers are to be expected before the judgments are ultimately final. It is now more than ten years since the tortious acts complained of occurred and petitioners have not been required to pay a penny of the damages that they caused. It is respectfully submitted that this unwarranted petition should be denied so that the litigation will be moved to a conclusion.

Respectfully submitted,

JOHN D. FASSETT,
Counsel for Respondent.

S. ROBERT JELLEY,
Of Counsel.

November 5, 1971

APPENDIX

STATE OF CONNECTICUT SUPREME COURT

HARTFORD COUNTY, OCTOBER TERM, 1969

6646

133884 UNITED AIRCRAFT CORPORATION

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.

133885 UNITED AIRCRAFT CORPORATION

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.

Defendants' Motion for Reargument

Defendants-appellants respectfully move this Court for an order granting reargument in this case. This Court's judgment raises two issues which were not passed below and which are not governed by any prior decisions of this Court:

(1) What relationship, if any, must an award of exemplary damages have to the amount recovered as compensatory damages?

(2) May exemplary damages be awarded in the full amount of expenses of litigation of issues with respect to which the plaintiff was unsuccessful, or with respect to which a new trial is directed?

Discussion

I. There is a wide split of authority throughout the United States respecting the relationship between the amount of compensatory damages awarded and the limit of an exemplary damages award. See *Annotation,* 17 A.L.R. 2d 527-550. The courts have followed one of three general approaches: (a) the amount of exemplary damages must bear a reasonable relation to the compensatory damages; (b) exemplary damages may be awarded only if some, or greater than nominal, compensatory damages are recovered by the plaintiff; or (c) exemplary damages are not dependent on the amount of compensatory damages.

This Court has never had occasion to decide which of these rules, or, indeed, some other rule, is Connecticut law. The issue is obviously one of general importance, and should not be decided without argument by adversaries on a record which squarely presents it.

That question was not ripe for argument prior to this Court's judgment herein, because exemplary damages was a fraction of the compensatory damages awarded below. With the latter award upset, the issue is not ripe for argument now. Indeed, whether that issue will arise hereafter in the present case depends on the outcome of the new trial which has been directed on compensatory damages. If plaintiff is unable to establish substantial damages at that trial, defendants should not be foreclosed from urging, in light of the reduced award, that the exemplary damages awarded on the basis of the prior compensatory damage award are, under the new award, excessive. "A fundamental requirement of due process is 'the opportunity to be heard'. *Grannis* v. *Ordean,* 234 U. S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380

U. S. 545, 552. Yet, if the present affirmance of the exemplary damage award stands, defendants will be denied the opportunity to urge this Court to reduce that award in light of the outcome of the new trial on compensatory damages. The effect would be to adopt, for purposes of the present cases, the minority rule (see 17 A.L.R. 2d at 529) that the amount of compensatory damages is irrelevant, although (1) this Court has never declared that to be Connecticut law; (2) defendants have not been heard on whether that should be the rule; (3) the result would be inconsistent with federal law, even on the narrowest reading of *Linn* v. *Plant Guards,* 383 U. S. 53, 64, distinguished in another context in this Court's opinion.

We submit since the result of a new damages trial obviously may be materially more favorable to defendants, no valid purpose can be served by thus pretermitting consideration of this issue.

II. The present award of exemplary damages includes substantial amounts for plaintiff's costs for proving damages, as to which this Court has now directed a new trial. This Court has never ruled on whether a plaintiff is entitled to receive its full litigation expense even though the original judgment was set aside on appeal, or the plaintiff was otherwise unsuccessful. This too, we submit is an issue of substance which should not be decided *sub silentio* against defendants. We urge the Court to hold that a plaintiff cannot recover for litigation expenses with respect to issues as to which it did not prevail. This is the principle followed by the federal courts in assessing attorney's fees recovered under § 4 of the Clayton Act. *Farmington Dowel Products Co.* v. *Forster Mfg. Co.,* 421 F.2d 61, 91-92 (C.A. 1) and cases cited id., at 92; *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers,* 241 F. Supp. 476, 489 (E. D. Mo.), aff'd, 368 F.2d 679 (C.A. 8). To require the defendant to pay the litigation expenses *of both sides,* on issues on which

defendant prevails, is so fundamentally unfair as to amount to a denial of due process of law. Moreover, placing the plaintiff in such a "heads I win, tails you lose" posture encourages exaggerated demands by plaintiffs, wherever an award of exemplary damages is assured or highly probable. As the First Circuit said in *Farmington*, "Were no discretion allowed to the court, a plaintiff could vastly increase the fee burden on a defendant by pursuing a plethora of insubstantial claims." 412 F.2d at 92. Particularly where, as here, the counsel fees and related costs involved are very substantial, and allocation presents no serious problem (since separate trials for liability and damages were held) defendant should not be required to bear plaintiff's total litigation expenses. Rather, the amount of those expenses properly chargeable to defendants should also be left open on remand.

III. We have thus far urged that reargument be granted, and that on reargument the award of exemplary damages be vacated for further consideration in light of the principles outlined herein. However, if the court should be of the opinion that revocation of the judgment is not warranted, we urge that reargument be granted and the original judgment modified to a limited extent; namely, that the affirmance of the award of exemplary damages be expressly subject to revision by further order of this Court when the case returns on appeal by either side after the new trial (or when the time of both sides to appeal has expired). This would not only preserve the issues raised herein for further consideration in light of subsequent developments; it would avoid a serious procedural problem which, even standing alone, would have prompted the present motion.

There is grave uncertainty whether the Court's present order on exemplary damages is a "final judgment," 28

U.S.C. § 1257, of which Supreme Court review must be sought *now* or *never*. On the basis of extensive research, and particularly in light of recent developments (*e.g., Local No. 438, etc.* v. *Curry*, 371 U. S. 542, 548-552; *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, 389, n. 4), it appears—though it is by no means clear—that for the purposes of review by the United States Supreme Court this Court's order *is* "final" in its present form.

We wish to make it entirely clear that we would prefer not to seek review by the United States Supreme Court at this time, but to seek review, if at all, only after all proceedings in this case in the courts of this state have been completed. But if the present posture of the exemplary damages award is unchanged, defendants will have no alternative to filing a Petition for Certiorari on the exemplary phase now, for a subsequent Petition addressed to that phase might be deemed untimely. See *Parker* v. *Illinois*, 333 U. S. 571; Stern and Gressman, *Supreme Court Practice*, 103 (4th ed., 1969). An order which makes clear that the entire judgment is subject to revision in this Court would relieve defendants of this dilemma, and would eliminate the burden of piecemeal application for and piecemeal review by the Supreme Court. Such an order would also hasten the new trial which this Court has directed, inasmuch as such trial would not be delayed by interim Supreme Court proceedings, and would thus serve the interests of the parties and sound judicial administration.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court, order reargument on the questions herein presented and, after reargument, vacate its affirmance of

the exemplary damage award, or modify said affirmance by expressly reserving its jurisdiction to alter the exemplary damage award on subsequent timely appeal from the new judgment on remand.

Respectfully submitted,

NORMAN ZOLOT,
Counsel for Defendants.

May 7, 1971